

SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

JEFF and ERIN WRISTON and  
WAHIAKUM COUNTY;

Petitioners,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

**SHB NO. 05-005**

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER**

Petitioners Jeff and Erin Wriston (“Wriston”) filed a petition for review with the Shorelines Hearings Board (“Board”) of the Washington Department of Ecology’s (“Ecology’s”) denials of a shoreline conditional use permit and shoreline variance for construction of a dock at the Wristons’ property on the Columbia River near Cathlamet in Wahkiakum County, Washington. The Board previously issued a summary judgment order in the case. The Board held a two-day hearing in Cathlamet and Lacey, Washington, on July 11 and 12, 2005. The Board and parties conducted a site visit on the first day of the hearing. Stephen Hill represented the Wristons. Assistant Attorney General Colleen Warren represented Ecology. Deputy Prosecuting Attorney Michael Sullivan represented Wahkiakum County. The Board for the appeal consisted of Bill Clarke, Presiding, William H. Lynch, David W. Danner, Judy Wilson, Mary Alyce Burleigh, and Steven Morrison. The court reporters were Kim Otis and Randi Hamilton of Gene Barker & Associates. Based on the testimony from sworn witnesses, exhibits admitted, and arguments by the parties, the Board enters the following:

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FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER

1 **I. FINDINGS OF FACT**

2 **[1]**

3 The Wristons sought the necessary permits to construct a floating recreational dock at  
4 their property near Cathlamet, Washington. *Testimony of Jeff Wriston.* A shoreline conditional  
5 use permit was necessary because the dock would include pilings, which under the Wahkiakum  
6 County Shoreline Master Program (WCSMP) are a conditional use in the Aquatic Conservancy  
7 environment. A shoreline variance was necessary because the maximum dock length in the  
8 WCSMP is 50 feet from the Ordinary High Water Mark (“OHWM”), and the Wristons sought to  
9 build a dock extending 90 feet from the OHWM. *Ex. P-1*

10 **[2]**

11 The Wristons initiated the permitting and environmental review process in the fall of  
12 2004. In October 2004, the Wristons filed applications with Wahkiakum County for a shoreline  
13 substantial development permit, shoreline conditional use permit, and shoreline variance, and  
14 submitted a State Environmental Policy Act (SEPA) Checklist. Wahkiakum County contracts  
15 with the Columbia River Estuary Study Taskforce (CREST) to provide staff-level review of  
16 shoreline permit applications. In November 2004, Wahkiakum County issued a SEPA  
17 Determination of Non-Significance. In December 2004, the Wahkiakum County Planning  
18 Commission recommended approval of both shoreline permits and the shoreline variance, and  
19 the Wahkiakum County Commissioners approved them. Wahkiakum County then forwarded the  
20 shoreline conditional use permit and shoreline variance decisions to Ecology for review. The  
21 Washington Department of Fish and Wildlife issued a Hydraulic Project Approval (HPA) for the

1 proposed dock in January 2005. In February 2005, Ecology denied the shoreline conditional use  
2 permit and shoreline variance and the Wristons filed this appeal with the Board. *Testimony of*  
3 *Jeff Wriston; Testimony of Skip Urling; Testimony of Jeffree Stewart; Testimony of Chuck Beyer;*  
4 *Ex. P-1.*

5 [3]

6 Ecology's denial of the shoreline variance and shoreline conditional use permit rested on  
7 a number of bases, including: (1) The project did not meet the variance criteria at WAC 173-27-  
8 170(1) and (3), (2) The project did not meet the criteria at WAC 173-27-160(2) and (2)(a), (3)  
9 The applicants already had reasonable recreational use of their property and reasonable means  
10 for launching or mooring of larger boats was available in the vicinity, (4) the proposed dock was  
11 not the minimum necessary, (5) a variance would constitute granting a special privilege, and (6)  
12 the design of the project was not consistent either with other authorized uses in the area or with  
13 planned uses in the area under the comprehensive plan and shoreline master program.  
14 Ecology's denial was in the form of a letter without analysis as to why the variance and  
15 conditional use requirements were not met. *Ex. P-1 pg. 2-3.*<sup>1</sup> Ecology's summary judgment  
16 pleadings and presentation at the hearing included more specific factual and legal reasons for the  
17 denial of the variance and conditional use permit.

18  
19  
20 <sup>1</sup> Ecology's letter denying the variance and conditional use permit cites WAC 173-27-160 (the conditional use  
21 regulation) regarding whether the Wristons have reasonable use of their property, whether the variance is the  
minimum necessary to afford relief, and granting of special privilege. These are variance criteria, not conditional  
use criteria. The Board believes Ecology intended to cite WAC 173-27-170. Thus, the Board's decision includes  
review of the two conditional use criteria in Ecology's denial.

1 [4]

2 The legal issues in this appeal are as follows:

- 3 1. Does the Wristons' application for a shoreline variance for a dock in excess of 50 feet  
4 in length satisfy the approval criteria of the Wahkiakum County Shoreline Master  
5 Program and shoreline regulations, the SMA policies of RCW 90.58.020, the review  
6 criteria of WAC 173-27-170, and other applicable laws and regulations?  
7 2. Does the Wristons' application for a shoreline conditional use permit for a dock  
8 satisfy the approval criteria of the Wahkiakum County Shoreline Master Program and  
9 shoreline regulations, the SMA policies of RCW 90.58.020, the review criteria of  
10 WAC 173-27-160, and other applicable laws and regulations?

11 The Board denied summary judgment motions on these issues due to disputed issued of material  
12 fact.

13 [5]

14 In 2004, the Wristons bought their house, located on State Route 4 ("SR-4") approximately  
15 seven miles East of Cathlamet. The Wristons' house is on approximately four acres of land on the  
16 Columbia River. The house, garage, and yard are located on a high bank with a view of the Columbia  
17 River. The Wristons, whose primary residence is in Vancouver, Washington, use the property as a  
18 vacation home. They expect to use the property at least three weekends per month, for a period of  
19 three or four days at a time. When the Wristons purchased the property, they were not aware of the  
20 characteristics of the river bottom of the Columbia River at the site. The Wristons were also not  
21 aware of the requirements in the WCSMP that limits dock length to 50 feet and requires the floating  
portion of the dock to remain one foot above the riverbed. They saw the existing trail to the shore and  
the presence of historical pilings at the site as indicators that it would be possible to access the  
shoreline and build a dock for moorage of recreational boat. *Testimony of Jeff Wriston.*

1 [6]

2 The Wristons purchased the property intending to build a dock to moor their boat, a 21-  
3 foot recreational powerboat used for water skiing, intertubing, and cruising. Since purchasing  
4 the property, the Wristons have launched their boat at a ramp in Cathlamet, and then driven the  
5 boat back to their property. They then make the same return trip to take their boat out of the  
6 water. To get from the boat to the shore at their property, people are either shuttled in on a  
7 rubber raft, or will swim if able to do so. Shuttling people to shore by rubber raft has proven  
8 difficult for certain people due to their physical condition or age. The Wristons' boat can only  
9 be brought to shore under higher tidal conditions, and must be moved before the tide drops  
10 because of the rocky river bottom. The marina in Cathlamet has a waiting list of over a year to  
11 get permanent moorage, and it is the closest moorage available. On many weekends and  
12 holidays, the waiting time to use the nearby boat ramp is considerable. There are other boat  
13 launches or marinas available, but they are more than 10 miles from the Wristons' property.  
14 When Columbia River salmon fishing is open, the Wristons must wait in line to launch their  
15 boat, and it is difficult to park the boat trailer in town. The boat, which is tied to the pilings  
16 when people want to get from the shore to the boat, cannot be left tied to pilings because the  
17 water goes over the top of the pilings at high tide. *Testimony of Jeff Wriston; Testimony of*  
18 *Jeffree Stewart.* There is a concern with operating the boat even at high tide because the  
19 presence of boulders in the area could damage a boat propeller. *Testimony of Lonnie Moss.*

1 [7]

2 The prior owners of the property constructed the trail from the house down to the shore of the  
3 Columbia River, and cleared a number of trees from the slope in front of the house. The Wristons  
4 added rock to the trail, which previously was dirt with some vegetation such as grasses. At the end of  
5 the trail, there is a landing area that provides access to the Columbia River. A picnic table is currently  
6 at the landing area. The shoreline in this area is very rocky. The Wristons property is located in a  
7 small bight or inlet of the Columbia River. Large rock outcroppings are at the east and west ends of  
8 the Wristons' shoreline along the Columbia River. Thirty-two creosote-treated pilings in rows of  
9 three are within the bight. If a straight line were drawn between the two rocky outcroppings, the 32  
10 existing pilings would be entirely on the landward side of the line. The proposed dock would extend  
11 no further than the row of existing pilings furthest from shore, so the proposed dock would also be  
12 entirely inside the bight. Historical evidence suggests that the old pilings were the foundation for a  
13 cannery or other structure related to commercial fishing built in the early 1900's, but the exact  
14 historical use of the pilings is unknown. This reach of the Columbia River is tidally-influenced.

15 *Testimony of Jeff Wriston; Testimony of Ronald Campbell.*

16 [8]

17 The Wristons' proposed dock is for personal recreational use and moorage. The dock  
18 would consist of a number of components, including a concrete pier located landward of the  
19 ordinary high water mark, a grated metal gangway four feet wide by 105 feet long (15 feet of  
20 which would be landward of the OHWM, 90 feet waterward of the OHWM), and an eight-foot-  
21 wide by 40-foot-long floating dock. Steel piles would be used to support the gangway and

1 anchor the floating dock so that it would rise and fall with the tide. *Testimony of Jeff Wriston;*  
2 *Testimony of Skip Urling.*

3 [9]

4 The dock design is intended to provide moorage throughout the expected range of river  
5 elevations, and keep the floating dock one foot off the river bottom as required by the WCSMP.  
6 To determine the length of dock needed to provide sufficient depth for moorage, depth readings  
7 were taken at each of the three rows of pilings at the site. The depth readings at each row of  
8 pilings, corrected for tidal influence, were 2 feet, 3.4 feet, and 8.6 feet. To these depths, the tide  
9 table showing the lowest tide of -2 feet and highest tide of +6 feet was applied. Consequently, at  
10 low tide, the bottom of the first row of pilings would be at water level, the bottom of the second  
11 row would have about one to two feet of water, and the bottom of the third row would have six  
12 to seven feet of water. Based on the depth of water needed to moor an average boat, the  
13 waterward edge of the floating dock must be roughly equal to the third row of pilings to provide  
14 sufficient depth for moorage. A dock extending 90 feet past the OHWM would be in this  
15 location. *Testimony of Lonnie Moss.*

16 [10]

17 A shorter dock, including a dock equal to the 50-foot maximum dock length in the  
18 WCSMP, would provide moorage only during higher tides, and boats moored at high tide would  
19 need to be removed prior to the tide falling or the boat would be grounded on rocks. The  
20 WCSMP also requires that the floating portion of docks remain one foot above the bottom of the  
21 river. The Wristons would not build a dock if its length meant that moored boats would be

1 grounded at low tide, and so would have water access through the current method of trailering  
2 their boat to Cathlamet, launching it at the marina, returning to their property, and then  
3 swimming or shuttling to shore. Without the proposed dock, the Wristons could still use their  
4 property to launch and retrieve smaller craft such as canoes or kayaks, though pulling them  
5 across the rocky beach and up onto the landing area is difficult. *Testimony of Lonnie Moss;*  
6 *Testimony of Jeff Wriston; Testimony of Christy McDonough.*

7 [11]

8 The dock has a number of design features to prevent or minimize environmental impacts.  
9 Lack of light penetration into water can affect marine plant growth. To prevent this, the dock  
10 would use steel grating rather than a solid top and would be elevated above the water up to the  
11 walkway down to the floating dock section to increase light penetration. Nine of the existing  
12 creosote-treated wood pilings would be removed and replaced with four steel pilings. The net  
13 removal of five pilings would increase available aquatic habitat area, and the removal of creosote  
14 would have water quality benefits. The construction of the dock will require no or minimal  
15 removal of vegetation, and the extension of the dock away from shore is better for juvenile  
16 salmon which prefer shallower nearshore water rather than the deeper water where the floating  
17 portion of the dock would be located. Piling caps are pointed to discourage perching birds that  
18 target juvenile salmonids that migrate through the area. The dock would not likely impede  
19 migration of juvenile salmonids. *Testimony of Skip Urling; Testimony of Ronald Campbell.*  
20 Ecology acknowledged that the dock would not have measurable environmental impacts.  
21 *Testimony of Jeffree Stewart.*



[12]

The north shore of the Columbia River around the Wristons' property has a number of distinct features, including proximity to State Route 4, high bluff properties with views of the Columbia River, some properties with river access, curves in the shoreline that create small points and inlets, and historical pilings. In some areas, SR-4 runs right next to the river. Elsewhere, SR-4 moves inland as it climbs up some of the high bluff areas. In these high bluff areas are approximately 55 residential lots, some of which have been developed with residential properties, and some of which could be further subdivided. A majority of the lots in close proximity to the Wristons' property are large lots with river frontages extending several hundred feet.<sup>2</sup> Wahkiakum County does not have any zoning restrictions concerning minimum lot size, except for limitations that may apply for health purposes. The master program does address the potential greater demand for docks because of increased development by providing that "In all new major waterfront subdivisions, priority should be given to the use of community pier and docks." WCSMP at 30. Some of these properties are like the Wristons', in that access to the shoreline is available from a trail or sloping bank. Other residential properties in the area are situated on bluffs that are so high and/or steep that access to the shoreline does not currently exist and would be difficult to develop. The uplands in the high bluff areas along SR-4 are forested or show prior forestry activity in most areas.

1 [13]

2 Mr. Wriston testified that his boat has a depth finder, and that the gentle slope from his  
3 property is not typical of other nearby properties where the river is deeper near the shore. The  
4 representative from CREST, the County's contract planning agency, testified that she has general  
5 knowledge of the shoreline on this stretch of the river, but did not take any separate soundings  
6 here. *Testimony of Christy McDonough*. It appears from the maps and other evidence that some  
7 parcels of land along the North shore may have similar bathymetry to the Wristons' property. It  
8 is unclear, however, whether it would be necessary for any of these large lot parcels to seek a  
9 variance for a dock in order to obtain sufficient depth to moor a boat. It may be possible for a  
10 dock to be located on the parcel in an area where the water is deeper closer to the shore. It is  
11 unclear from the evidence how many parcels along the North shore where shoreline access is  
12 possible from the upland would require a variance from the 50-foot dock length maximum if  
13 they desired a dock.

14 [14]

15 Ecology is concerned about dock proposals that would require the property owner to  
16 develop shoreline access if it currently does not exist. Ecology's specific concerns relate to  
17 removal of shoreline vegetation, construction of trails, stairs, stair towers, or ramps. The  
18 construction of these methods of shorelines access could have environmental and aesthetic  
19 impacts to the shoreline environment. *Testimony of Jeffree Stewart*. In the case of the  
20 Wristons' property, the trail to the shoreline was constructed by the previous owner. The

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21 <sup>2</sup> Ex. P-1, page 10 of 66.

1 modifications made to the trail by the Wristons were to change the routing of the trail at the top  
2 of the bluff to avoid encroaching on the adjacent lot, and to add rock to the dirt trail. The  
3 previous owner cleared the trees from the area in the front of the Wristons' house. The  
4 modifications to the trail by the Wristons did not impact the shoreline environment, though the  
5 rock surface may act to prevent erosion of soil down the slope. *Testimony of Jeff Wriston.*

6 [15]

7 A property to the West of the Wristons referred to as the McVicar property has a  
8 recreational dock that was constructed before or during the 1970's. Wahkiakum County does not  
9 have a record of shoreline permits for the dock, which also includes a small breakwater. The  
10 north shore area is next to the designated shipping channel for the Columbia River and because  
11 of this is a less desirable area for recreational boating than areas of the river free of commercial  
12 ship traffic. Large ocean-going vessels produce large wakes in the vicinity. In addition to the  
13 Wristons' property, the north shore area has another area with pilings from historical commercial  
14 activities that are located west of the Wristons.

15 [16]

16 The nature of the Columbia River's shorelines in Wahkiakum County vary. South of  
17 Cathlamet, Puget Island is a large island in the middle of the Columbia River. Puget Island can  
18 be reached from the Washington side of the river by a bridge from Cathlamet. A ferry connects  
19 Puget Island to the Oregon side of the river. Agricultural and rural land uses predominate. Puget  
20 Island has a number of sloughs that cut through the low and flat terrain of the island. Along  
21 these sloughs are a number of residential properties. Many of these residential properties have

1 recreational docks that extend beyond the maximum 50-foot length in the WCSMP. Extending  
2 these docks more than 50 feet beyond the OHWM was necessary because of the low and flat  
3 slope in the sloughs.

4 **[17]**

5 Wahkiakum County determined that the Wristons' proposal met the requirements for a  
6 shoreline conditional use permit and variance under the WCSMP and Ecology's shoreline  
7 regulation. The County applied variance criteria from the WCSMP that were less stringent than  
8 Ecology's variance regulations at WAC 173-27-170. While the County applied its own variance  
9 criteria, those criteria have been made invalid by Ecology's subsequent adoption of a more  
10 stringent regulation in WAC 173-27-170. On summary judgment, the Board determined that the  
11 more stringent Ecology variance regulations applied in this case. Wahkiakum County also did  
12 not undertake a review of possible cumulative impacts from the proposal, and based its  
13 conclusion that the proposal would not be contrary to the public interest on the fact that members  
14 of the general public did not express any interest or concern about the proposal.

15 **[18]**

16 Ecology's letter denying the shoreline conditional use permit and variance cited a number  
17 of the provisions of its variance and conditional use permit regulations (WAC 173-27-170 and  
18 173-27-160) that it felt were not met by the proposal. At hearing, Ecology focused on the  
19 reasonable use of the property, lack of extraordinary circumstances, consistency with other uses,  
20 and cumulative impacts as the basis for denial.

1 [19]

2 Jeffree Stewart, who reviewed the Wristons' applications, conceded that he could not  
3 testify that the dock itself would have adverse environmental impacts, but that cumulative  
4 impacts could occur if other property owners sought to build docks and needed to clear upland  
5 vegetation to provide shoreline access. Ecology has not previously denied similar applications  
6 for variances for recreational docks in Wahkiakum County. In this case, however, Ecology  
7 determined that a different standard should apply to the north shore area than for Puget Island,  
8 where variances have been previously approved. Stewart also testified regarding possible  
9 cumulative impacts to the area based on population growth in the Vancouver and Portland area  
10 and the relative low price of real estate in Wahkiakum County. *Testimony of Jeffree Stewart.*

11 [20]

12 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.  
13 Based on the foregoing Findings of Fact, the Board enters the following:

14  
15 **II. CONCLUSIONS OF LAW**

16 [1]

17 The Board has jurisdiction over the subject matter and the parties. RCW 90.58.180. As  
18 the appealing party, the Wristons have the burden of proof. RCW 90.58.140(7).

19 [2]

20 Under the WCSMP, docks are prohibited in the Natural Environment but are a permitted  
21 use in the Conservancy, Rural, and Urban Environments. The WCSMP has a number of

provisions regulating dock construction. Docks are not permitted outright in the Conservancy Environment but require a conditional use permit. Docks may extend up to 50 feet from the OHWM. The size of the dock must be the minimum necessary to fulfill the purpose of the dock. In tidally influenced areas, a floating dock must be at least one foot above the bed bottom. WCSMP, pg. 48. The Wristons sought a variance to construct a dock 90 feet waterward from the OHWM. This length is necessary to comply with the requirement that the floating dock be at least one foot above bed bottom throughout the range of normal tidal conditions.

**[3]**

The Shoreline Management Act requires that each shoreline master program and Ecology regulations include provisions for conditional uses and variances. Under the SMA, the purpose of the conditional use and variance provision is to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect.

RCW 90.58.100(5)

To be eligible for a shoreline variance, a party bears the burden of showing that the criteria in WAC 173-27-170, Ecology's shoreline variance regulation, have been met. For a variance waterward of the OHWM, there are nine separate criteria. The parties provided evidence and argument on the criteria. The Board addresses each of the nine variance criteria:

1 **1. Applicant must demonstrate extraordinary circumstances, the public interest shall**  
2 **suffer no substantial detrimental effect, and denial of the variance would result in a**  
3 **thwarting of the policy in RCW 90.58.020. (WAC 173-27-170(1)).**

4 [4]

5 The site presents extraordinary circumstances in which the rocky and gently sloping  
6 shoreline bathymetry imposes an unnecessary hardship on the Wristons. Under current  
7 conditions, access between a boat and the shoreline is difficult and sometimes unsafe.  
8 Construction of a 50-foot dock would impose unnecessary hardships on the Wristons by  
9 requiring them to limit boating access only to when allowed by tidal changes, continue to swim  
10 or shuttle people ashore, and require boats to be dragged over rocks to tie up to shore. At a  
11 shoreline site like the Wristons, these are all unnecessary hardships. The Board concludes that  
12 the Wristons meet this criterion. The other topics within WAC 173-27-170(1) are addressed  
13 below as other subsections of the variance regulation address these topics more specifically.

14 **2. That the strict application of the bulk, dimensional or performance standards set forth**  
15 **in the applicable master program precludes all reasonable use of the property (WAC 173-**  
16 **27-170(3)(a)).**

17 [5]

18 As mentioned earlier, the WCSMP refers to former WAC 173-14-150 for the criteria by  
19 which a variance application is evaluated. WCMP, viii and ix, Ex. P-9, page 3. This WAC was  
20 repealed by Ecology and replaced with WAC 173-27-170. The previous WAC referred to  
21 whether an applicant was being precluded “a” reasonable use of the property. WAC 173-27-  
170(3)(a) is stricter than the previous WAC because the applicant must demonstrate that “all”

1 reasonable use of the property is precluded. In the Summary Judgment decision this Board held  
2 that the Petitioner would have to demonstrate all reasonable use of the property was precluded.  
3 *Order on Summary Judgment*, at 6 (citing *Jain v. Ecology*, SHB No. 03-022 (Order on Summary  
4 Judgment)(March 18, 2004)(the more restrictive provision applies if there is a conflict between  
5 the local master program and the WAC).

6 Ecology argued that the Wristons are not precluded from all reasonable use of their  
7 property because “they have a home on their property and access to the river from their  
8 property.” *Ecology’s Closing Brief at 5*. In response, the Wristons argued

9 If this were the standard, however, no property owner seeking a variance for a structure  
10 waterward of the ordinary high water mark could ever obtain a variance because there  
11 will always be a ‘reasonable’ recreational use of the property involving shoreline access.  
*Wristons’ Closing Brief at 5*.

12 The Wristons’ argument is correct in noting the problematic nature of Ecology’s  
13 interpretation of the “all reasonable use” standard for variances waterward of the OHWM.  
14 Ecology’s literal interpretation of the “all reasonable use” phrase in the waterward variance  
15 criteria conflicts with the statutory interpretation rule that one must “avoid literal reading of a  
16 statute that would result in unlikely, absurd, or strained consequences.” *State v. McDougal*, 120  
17 Wn.2d 334, 350, 841 P.2d 1232 (1992); *Lindeman v. Kelso School District*, 127 Wn. App. 526,  
18 599 (2005). For example, under Ecology’s interpretation, if shoreline access provides a property  
19 owner reasonable use of the property, then no property for which shoreline access exists could  
20



1 qualify for a variance waterward of the OHWM.<sup>3</sup> Or, a property owner could qualify for a  
2 variance waterward of the OHWM only if the property owner did not have shoreline access –  
3 which raises the question of why a variance for a structure waterward of the OHWM would be  
4 sought if the shoreline cannot be accessed. Even beyond the shoreline access as reasonable use  
5 problem, Ecology’s interpretation would also result in a situation in which an owner of a vacant  
6 lot seeking a variance for construction of a dock would be denied if a house could be built on the  
7 property.

8 **[6]**

9 If the intent of the variance regulation is to prohibit variances waterward of the OHWM,  
10 then the solution would be to adopt a regulation with that prohibition. Absent that, there must be  
11 circumstances under which a property owner can obtain a variance waterward of the OHWM.  
12 Otherwise, the existing provisions in the SMA, local master programs, and in Ecology’s  
13 regulations allowing for such a variance would be meaningless. RCW 90.58.100(5), the  
14 statutory basis for all shoreline variances, applies to “each master program” adopted by local  
15 governments, and further states that “the concept of this subsection shall be incorporated in the  
16 rules adopted by the department relating to the establishment of a permit system as provided in  
17 RCW 90.58.140(3).” Thus, the variance regulations adopted by Ecology in WAC Chapter 173-  
18 27 must be consistent with the concepts of RCW 90.58.100(5). This statute provides four factors  
19 for shoreline variances: (1) extraordinary circumstances, (2) to prevent unnecessary hardships,  
20

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21 <sup>3</sup> The Board recognizes that the situation presented by Henry Island, which has no ferry service, community dock, or road system, requires a dock for access to the residence. *Bishop v. San Juan Co.*, SHB No. 99-034 (2000). That

1 (3) if the public interest suffers no substantial detrimental effect, and (4) consistency with the  
2 policies of RCW 90.58.020. The “denies all reasonable use” phrase in WAC 173-27-170 on  
3 which Ecology relies for the denial of the variance in this case is not one of the four statutory  
4 variance requirements. However, the application of the reasonable use criterion in WAC 173-  
5 27-170 can be consistent with the statutory variance factors in RCW 90.58.100 because the  
6 statute requires the application of RCW 90.58.020, and RCW 90.58.020 establishes policies for  
7 reasonable uses of shorelines of the state.

8 [7]

9 Under the policies of the SMA,

10 [U]ses shall be preferred which are consistent with the control of pollution and  
11 prevention of damage to the natural environment, or are unique to or dependent upon use  
12 of the state’s shoreline. Alterations of the natural condition of the shorelines of the state,  
in those limited instances when authorized, shall be given priority for single family  
residences and their appurtenant structures . . .

13 RCW 90.58.020. In this case, the Wristons’ proposed dock is both consistent with control of  
14 pollution and prevention of damage to the natural environment. More importantly, in the context  
15 of a variance waterward of the ordinary high water mark, the Wristons’ dock proposal is  
16 “dependent upon use of the state’s shorelines.”

17 [8]

18 The Board has previously determined that a variance waterward of the ordinary high  
19 water mark is not appropriate for a use that is not water dependent. That is, if a use can occur  
20 elsewhere on the property, then denial of a variance for that use does not deny all reasonable use

21 

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situation, however, is quite unusual in the state and not present here.

1 of the property. See *In John Limantzakis dba Latitude 47° Restaurant v. City of Seattle*, SHB No.  
2 78-10 (1978). In contrast, the Board has authorized variances waterward of the ordinary high  
3 water mark for water dependent uses. In *Harvaug v. Ecology*, SHB No. 96-27 (1996), a property  
4 owner on Lake Whatcom sought a variance from the 40-foot dock length maximum in the  
5 Whatcom County SMP. The property owner sought the variance due to the changing lake  
6 elevations that made a 40-foot dock useless for moorage during certain times of the year.  
7 Ecology denied the variance. On appeal, the Board reversed Ecology and allowed a variance to  
8 build a 70-foot dock that would allow moorage during the May to October boating season.

9 [9]

10 *Harvaug* is instructive, though not controlling, because that case used the “denies a  
11 reasonable use” variance standard that was in Ecology’s shoreline regulations before those  
12 regulations were changed to the existing “denies all reasonable use” variance standard at issue in  
13 this case. However, in *Snow and King County v. Ecology*, SHB No. 98-020, Ecology denied an  
14 application for variance from the side yard setback requirement for construction of a dock  
15 appurtenant to an existing single-family residence under the “denies all reasonable use” standard.  
16 Ecology’s denial was based in part on its determination that denial of the variance would not  
17 preclude all reasonable use of the property. SHB 98-020, *Conclusion of Law VII*. On appeal, the  
18 Board reversed Ecology on the basis that the reasonable use of a particular parcel depends on the  
19 size, location, and physical attributes of the land. *Id.*, citing *Buechel v. Ecology*, 125 Wn.2d 196  
20 (1994). See also *Garrett v. Ecology*, SHB No. 03-031/032 (2005) (reasonableness is fact  
21 specific inquiry based on a number of factors); and *Northrup v. Klickitat County*, SHB No. 92-

1 40, at 8 (1993) (reasonable use is based on an objective standard and not the desires of a  
2 particular applicant). In this case, Ecology’s determination that denial of the Wriston variance  
3 would not deny all reasonable use of the property is identical to the determination rejected by the  
4 Board in *Snow*.

5 [10]

6 Two other decisions by the Board regarding this issue provide little guidance in the  
7 overall analysis of this section. In *Jain, id.*, the Board was presented solely with the issue on  
8 summary judgment of whether the more restrictive WAC should be utilized rather than the  
9 provision in the City of Medina master program based upon the previous, more lenient WAC  
10 relating to preclusion of reasonable use. The *Jain* decision does not discuss how that particular  
11 variance criterion was to be applied to the dock in issue in that case. In *Kennedy v. Seattle*, SHB  
12 No. 98-18, at 14 (1998), the Board stated that the applicant “has a reasonable use of his  
13 property, with the residence. He also will have a reasonable use with the dock that is allowed  
14 under this decision.” The *Kennedy* decision, therefore, involved a property owner with an  
15 existing dock that was too small for his 44-foot long boat. The Board, therefore, was ruling on  
16 the reasonableness of a proposed dock when compared to an existing dock, and not whether the  
17 preclusion of a dock that would allow use throughout the day denied all reasonable use of the  
18 property.

1 [11]

2 Consequently, the Board concludes that Ecology’s literal interpretation of the phrase  
3 “denies all reasonable use” phrase in WAC 173-27-170(3)(a) is incorrect. Ecology’s literal  
4 interpretation of this phrase raises questions of consistency with the statutory variance criteria in  
5 RCW 90.58.100(5), the policies of the SMA in RCW 90.58.020, and prior Board and appellate  
6 decisions. The common thread running through *Buechel*, *Lattitude 47°*, *Snow*, and *Varhaug* is  
7 that the issue of reasonable use depends in large part on whether the proposed use for which a  
8 variance is sought is water dependent. In *Buechel* and *Lattitude 47°*, variances waterward of the  
9 OHWM were denied for uses that were not water dependent. In *Snow* and *Varhaug*, the Board  
10 approved waterward of OHWM variances for water dependent uses (residential docks). To the  
11 extent that previous Board decisions suggest that a literal interpretation of the “denies all  
12 reasonable use” phrase in WAC 173-27-170(3)(a) is appropriate for a water dependent use, those  
13 decisions are overruled.

14 [12]

15 In *Buechel*, the Supreme Court, in analyzing the issue of what constitutes reasonable use  
16 of property, stated “To some extent the reasonable use of property depends on the expectations  
17 of the landowner at the time of the purchase of the property.” 125 Wn.2d 196, 209 (1994). The  
18 Wristons’ expectation that a dock could be built was based on their observation of the 32 pilings  
19 in the water indicating previous overwater uses. Ultimately, the proposed dock extends no  
20 further than pilings seen by the Wristons as indication of where over-water construction could  
21 occur. Further, absent the variance, the Wristons’ methods for boating access are not

1 reasonable. Dragging smaller boats across the rocks near shore, swimming to shore from a boat  
2 or being shuttled by raft, or having periodic moorage at the site based on tidal conditions are not  
3 reasonable given that docks are currently allowed under the WCSMP in this environment up to  
4 50 feet in length. This is an important distinction from two previous Board decisions, one of  
5 which denied a shoreline substantial development permit even though the boat grounded at low  
6 tide, *Viafore v. Mason Co.*, SHB No. 99-033 (2000); and the other which denied a shoreline  
7 substantial development permit even though the residents of the area had to drag boats across the  
8 tidelands at low tide. *Bellevue Farm Owners Association v. San Juan Co.*, SHB No. 96-23  
9 (1996), *aff'd in Bellevue Farm Owners Associations v. SHB*, 100 Wn.App 341 (2000).<sup>4</sup>

10 [13]

11 The unavailability of existing moorage is a difficult decision in this case. In *Friends of*  
12 *the San Juan v. Gordon*, SHB No. 94-28, at 4 (1995), the Board found that a drive of  
13 approximately ten miles did not render alternative moorage infeasible. In that case, however, the  
14 petitioner was actually mooring his boat at that marina ten miles away. Here, the moorage that is  
15 available ten miles away has a waiting list of at least one year. The length of time a petitioner  
16 must wait for available moorage is a factor in the Board's variance analysis relating to the  
17 unavailability of existing moorage. Although a wait of one year for moorage space may not be  
18 too long in certain situations, the total circumstances present here, including the lack of potential  
19 harm to the shoreline environment under the proposed project, dictate that the Board finds in  
20 favor of the Wristons on this prong of the variance criteria. Here, the Wristons' property has

21 \_\_\_\_\_  
<sup>4</sup> Both of these Board decisions emphasized the potential for cumulative impacts and the lack of compatibility with  
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1 existing access to the shoreline so construction of a trail or stairs to use the dock is not necessary.  
2 The Wristons' property, in its existing configuration, is ready-made for construction of a dock so  
3 that impacts landward of the OHWM will not occur. The Wristons' proposal also is consistent  
4 with the policies of RCW 90.58.020, which prioritize water dependent uses. The Board  
5 concludes that the Wristons meet the criterion in WAC 173-27-170(3)(a) that denial of the  
6 variance would preclude all reasonable use of the property. The variance is for a use that is  
7 authorized by the WCSMP, and is necessary based on the physical attributes of the land.

8 [14]

9 **3. That the hardship is specifically related to the property, and is the result of unique**  
10 **conditions such as irregular lot shape, size, or natural features and the application of the**  
11 **master program, and not, for example, from deed restrictions or the applicant's own**  
12 **actions (WAC 173-27-170(2)(b));**

13 As noted in the Board's analysis of variance criterion 1, the 50-foot dock length  
14 maximum is an unnecessary hardship to the Wristons. The hardship is caused by the natural  
15 features of the shoreline, including the rocky shoreline and the bathymetry of the shoreline that  
16 provides sufficient depth for moorage at about 90 feet from shore. The Wristons meet this  
17 criterion. This does not mean that every waterfront property is entitled to a variance if one is  
18 required to provide sufficient depth for moorage. The Wristons' property has unique features  
19 including the presence of old pilings at the outer edge of the proposed dock, the inlet along the  
20 shoreline that has the effect of keeping the Wristons proposed dock close to shore and away from

21 the natural shoreline. Those concerns are not present here.

1 navigational areas, existing access to the shoreline, and a configuration allowing a dock design  
2 that will not cause adverse effects to the shoreline.

3  
4 **4. That the design of the project is compatible with other authorized uses within the area**  
5 **and with uses planned for the area under the comprehensive plan and shoreline master**  
6 **program and will not cause adverse impacts to the shoreline environment (WAC 173-27-**  
7 **170(2)(c));**

8 [15]

9 The parties differed over the particular uses and the areas that should be considered for  
10 purposes of determining compatibility of uses. Ecology argued that the McVicar dock cannot be  
11 considered in this analysis because it is a non-conforming use based on its design, and there is no  
12 evidence of shoreline permits for the dock and bulkhead structures. The Wristons argued that the  
13 McVicar dock should be considered because even if non-conforming, it is at least lawful and  
14 therefore authorized. It is not clear from the record whether the McVicar dock predates the  
15 Shoreline Management Act. The courts have stated that a finding of compatibility cannot be  
16 substantially based on the existence of a nonconforming use in the area. *Jefferson County v.*  
17 *Seattle Yacht Club*, 73 Wn.App 576, 591, 870 P.2d 987 (1994), *review denied*, 124 Wn.2d 1029,  
18 883 P.2d 326 (1994). Because the Petitioners have the burden of proof, the Board will not  
19 consider the presence of the McVicar dock in its analysis.

20 [16]

21 Ecology and the Wristons also differed on the proper geographic scope of “the area” at  
issue in analyzing environmental impacts and compatibility under WAC 173-27-170(2)(c).



1 Specifically, Ecology argued that the variances granted for construction of docks over 50 feet in  
2 length on Puget Island are not relevant because Puget Island is both too distant from the north  
3 shore and too different in character to be considered in the same “area” as the Wristons’  
4 proposal. The Wristons argued that Puget Island should be considered within the area because it  
5 is within Wahkiakum County, on the same waterbody, and because the variances were granted to  
6 address the same issue of gently sloping shoreline bathymetry. In *Seattle Yacht Club*, the Court  
7 of Appeals addressed this question:

8 . . . [C]onsideration of a proposed project’s compatibility with the area immediately  
9 adjacent to the project site should be paramount. While consideration of a project’s  
10 compatibility with more distant uses might be useful in certain instances, consideration of  
11 such information must be in addition to, not in lieu of, an evaluation of a project’s  
12 compatibility with permitted land and water uses in the area immediately adjacent to the  
13 project site. This is essential because if too broad a view is taken when a permit  
14 application is evaluated for compatibility with the SMA and the applicable shoreline  
15 master program, almost any project can be justified. Such an approach would undermine  
16 the protections the aforementioned enactments are intended to provide to individual local  
17 shoreline environments.

18 In following this same approach, the Board concludes that the geographic area to be  
19 considered for purposes of this case is the north shore of the Columbia River. Not only is this  
20 analytical framework consistent with the “immediately adjacent” concept in *Seattle Yacht Club*,  
21 it also reflects the distinct differences between the north shore of the Columbia River and other  
22 areas within Wahkiakum County. For example, witnesses noted that while Puget Island was a  
23 low, flat agricultural land with sloughs, the north shore area is characterized by bluffs, rocky  
24 hillsides, forested land, and the presence of SR-4.

1  
2  
3 [17]  
4

5 The fact that this will be one of the first docks in this scenic area is not the end of the  
6 compatibility analysis. The Board stated in *Inskeep v San Juan Co.*, SHB No. 98-033 (1999):

7 Any dock will have a physical presence and alter the view of a particular shoreline. The  
8 proposed dock minimizes this impact by its location and design features. It is not  
9 determinative that the dock will be the first such facility in Horseshoe Bay. More  
important is the extent to which it will constitute a visual presence on the environment  
and the significance of the man-made alteration.

10 *Id.* at 7.

11 [18]  
12

13 In *Inskeep*, the Board observed the dock “will have a low profile and blend in with the  
14 surrounding high bank shoreline from most views.” *Id.* at 7. The Board distinguished both  
15 *Bellevue Farm Owners Association*, where a large facility was proposed to be built over a tidal  
16 flat, and *Friends of the San Juan v. Gordon*, where the proposed dock was at a prominent  
17 position at the mouth of Mitchell Bay. *Id.* at 7. Similarly, the Board denied a shoreline  
18 substantial development permit for a dock on the eastern shore of Pickering Passage across from  
19 Hartstene Island. The shoreline views near Pickering Passage were unobstructed and relatively  
20 pristine with the exception of two structures. *Viafore v. Mason County*, SHB No. 99-033.  
21 (1999). It is not necessary for an area to be relatively pristine for a proposal to violate the  
compatibility criterion. *Gennotti v. Mason Co.*, SHB No. 99-011 (1999), involved an area along

1 Hood Canal that was well-developed both along the shoreline and immediate upland. After first  
2 acknowledging the area was not pristine, the Board stated that “[n]evertheless, the area is  
3 currently devoid of any large structures protruding out into the water. If allowed, the proposed  
4 pier-dock-float would not be compatible with the shoreline area where it is located. *Gennotti* at  
5 6.

6 [19]  
7

8 Within the north shore area, the authorized uses include existing residential homes,  
9 shipping traffic, and recreational boating. The Wristons’ proposed dock is compatible with these  
10 uses. The uses planned for this area include construction of docks, which are a conditional use in  
11 the Aquatic Conservancy Environment. The Wristons’ proposed dock does not protrude  
12 prominently into the river. Its length is limited to where the existing pilings are presently  
13 located. The Board finds that the dock will blend into the environment. Thus, the Wristons’  
14 dock is consistent with uses planned for the area.

15 [20]  
16

17 The Wristons’ dock will not have measurable adverse impacts to the shoreline  
18 environment. The dock has been subject to review by the Washington Department of Fish &  
19 Wildlife, which issued a Hydraulic Project Approval, and also by federal fisheries agencies. The  
20 design of the dock includes numerous features that will prevent shoreline environmental impacts.  
21

1  
2  
3 [21]

4 **5. That the variance will not constitute a grant of special privilege not enjoyed by the other**  
5 **properties in the area (WAC 173-27-170(2)(d));**

6 Ecology's letter denying the variance concluded that the variance would be a grant of  
7 special privilege, but did not provide a factual basis for this conclusion. At hearing, Ecology  
8 implied that because there are few docks on the north shore area near the Wristons, and none  
9 constructed recently, that a dock variance would be special privilege. Under this logic, the first  
10 variance granted in any area would be a special privilege because no one else has one. While  
11 Ecology has granted a number of dock length variances on Puget Island, the Board has  
12 concluded that the "area" for purposes of the variances criteria is the north shore of the Columbia  
13 River. While there are few docks in this area, approving a variance for the Wristons is not a  
14 special privilege. The existing configuration and bathymetry of the shoreline at the Wristons'  
15 lot, coupled with the present existence of pilings, makes it difficult to argue that other property  
16 owners in the area are similarly situated.

17 [22]

18 **6. That the variance requested is the minimum necessary to afford relief (WAC 173-27-**  
19 **170(2)(e));**

20 This same criterion is a requirement in the WCSMP. The waterward edge of the floating  
21 dock structure would be roughly equal the last row of the existing pilings, so the dock will not  
extend any further from shore than do existing piles. The testimony showed that location is the

1 point at which the shoreline bathymetry changes from a gentle to a steeper slope. This change is  
2 slope would allow a boat to be moored to the floating dock under the normal range of tidal  
3 conditions. Thus, it is the minimum necessary to afford relief from the 50-foot dock length  
4 maximum. It is also the minimum necessary to provide relief from the requirement in the  
5 WCSMP that docks be designed to provide a minimum of 1 foot above the bed bottom.

6  
7 [23]

8  
9 **7. That the public rights of navigation and use of the shorelines will not be adversely  
10 affected (WAC 173-27-170(3)(c));**

11 The evidence showed that the Wristons' property is a small bight or inlet in the Columbia  
12 River. If a straight line were drawn from the points at the east and west ends of the Wristons'  
13 shoreline, the entire dock would be inside (landward) of this line. The proposed dock extends no  
14 further into the river than the existing rows of pilings, thus there is no adverse effect on public  
15 rights of navigation and use of the shorelines.

16 [24]

17 **8. That the public interest will suffer no substantial detrimental effect (WAC 173-27-  
18 170(2)(f)).**

19 In its review of the Wristons' variance application, Wahkiakum County concluded that  
20 the public interest would not be affected because members of the public did not express any  
21 interest in the project. This is an incorrect application of the public interest criterion. In making  
a decision on a shoreline variance, the public interest must be considered regardless of the

1 number, nature, or extent of public comments for or against a proposal. Public interests that are  
2 considered may include environmental impacts, aesthetics, or recreation. The specific public  
3 interests at issue in a given permit decision depends on the proposed project, its location, and  
4 possible impacts. In this case, the Wristons' proposal will not result in detrimental effect to the  
5 public interest. The public interest in shoreline protection, use, and navigation are all protected  
6 by the design of this project.

7 **9. Consideration shall be given to the cumulative impact of additional requests for similar**  
8 **variances in the area. WAC 173-27-170(4).**

9 [25]

10 Ecology also denied the variance based on potential cumulative impacts. While its  
11 letter denying the variance did not explain the basis for cumulative impacts, Ecology provided  
12 testimony on its cumulative impacts theory. First, Ecology felt that population growth near  
13 Vancouver and Portland could result in growth pressure in Wahkiakum County as people sought  
14 to buy and develop less expensive waterfront property in Wahkiakum County. Second, Ecology  
15 was concerned that granting a variance here would set a precedent that would result in additional  
16 docks in the north shore area, including docks that would require construction of shoreline access  
17 by trails or stairs on lots that do not currently have shoreline access.

18 [26]

19 Ecology is correct that the proliferation of waterward of OHWM variances should be  
20 prevented. However, to establish that such proliferation of variances is likely to occur, there  
21 must be a factual basis to support that likelihood. In this case, such a factual basis is lacking. In

1 the north shore area at issue, SR-4 runs along the Columbia River in a number of areas. Thus,  
2 docks will not be built in these reaches. In other areas of the north shore, access to the shoreline  
3 does not exist and would be difficult to accomplish without significant expense and  
4 environmental permitting. Some of the parcels along the north shore appears to be deeper along  
5 the shoreline, which eliminates the need for docks needing variances. The WCSMP also  
6 designates part of the north shore area as a Natural Shoreline, where dock construction is  
7 prohibited. Thus, cumulative impacts are not likely to occur because the land use pattern in area  
8 will not result in additional requests for similar variances. See *Snow & King County v.*  
9 *Ecology*, SHB No. 98-20, Conclusion of Law X. In *Garlick v. Whatcom Co.*, SHB No. 95-6, at  
10 11 (1995), only four lots at best were identified as potentially requiring a variance like the  
11 petitioners, and the likelihood of those variances being sought appeared remote. The Board  
12 found that the cumulative effects provision was not violated.

13 Even if there is an increase in variance requests for docks in this area due to new  
14 development, the WCSMP provides that “In all new major waterfront subdivisions, priority  
15 should be given to the use of community pier and docks.” WCSMP at 30. The Board believes  
16 that Wahkiakum County must give this provision meaning if new subdivisions create parcels  
17 with waterfront access. In addition, the Board has held that only joint use docks may be  
18 approved in certain areas where cumulative impacts is a concern. *Bishop*, at 7. Ecology may  
19 require only joint use docks in this area in the future. Ecology has other tools, such as the  
20 shoreline master plan approval process to address development concerns in this area more  
21 comprehensively.

1 [27]

2 The Wristons' proposal also required a shoreline conditional use permit. This is because  
3 the dock will include steel pilings, and the placement of pilings is a conditional use in the aquatic  
4 rural designation in the WCSMP. Wahkiakum County determined the Wristons met the  
5 conditional use criteria. Ecology's denied the conditional use permit for two reasons, both of  
6 which are identical to the variance criteria.<sup>5</sup> Ecology determined that the Wristons' proposal did  
7 not meet WAC 173-27-160(2) regarding cumulative impacts and WAC 173-27-160(1)(c)  
8 regarding consistency with other authorized uses within the area and with uses planned for the  
9 area under the comprehensive plan and shoreline master program. The Board has already  
10 determined that the Wristons' proposal meets the cumulative impacts and consistency with other  
11 uses criteria in the variance regulation. The Board reaches the same conclusions that the  
12 Wristons meet the criteria in WAC 173-27-160 for a shoreline conditional use permit based on  
13 the analysis in sections relating to the identical criteria.

14 [28]

15 Any Finding of Fact deemed to be Conclusion of Law is hereby adopted as such.

16 **BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE**  
17 **BOARD ENTERS THE FOLLOWING**

18  
19  
20 <sup>5</sup> Ecology's letter denying the variance and conditional use permit cites WAC 173-27-160 (the conditional use  
21 regulation) regarding whether the Wristons have reasonable use of their property, whether the variance is the  
minimum necessary to afford relief, and granting of special privilege. These are variance criteria, not conditional  
use criteria. The Board believes Ecology intended to cite WAC 173-27-170. Thus, the Board's decision includes  
review of the two conditional use criteria in Ecology's denial.



1 **ORDER**

2 Ecology's decision denying the Wristons' Application for a Shoreline Variance and  
3 Shoreline Conditional Use Permit is REVERSED.  
4 SO ORDERED this 28<sup>th</sup> day of September 2005.  
5

6 **SHORELINES HEARINGS BOARD**

7 BILL CLARKE, Chair, Presiding

8 WILLIAM H. LYNCH

9 DAVID W. DANNER

10 MARY ALYCE BURLEIGH

11 JUDY WILSON

12 STEVEN W. MORRISON  
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21